No. 433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

CANADIAN RIVER GAS COMPANY, a Corporation, and COLORADO INTERSTATE GAS COMPANY, a Corporation,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Canadian River Gas Company and Colorado Interstate Gas Company, Petitioners herein, respectfully pray for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered March 4, 1940, (R. p. 47) rehearing denied July 24, 1940. (R. p. 64), granting a motion to dismiss a petition to review an order of the Federal Power Commission entered in a proceeding against petitioners under the Natural Gas Act (52 Stat. 821), which order definitely and finally determined the status of Petitioners as Natural Gas Companies under said Act (R. p. 21), contrary to the contentions of Petitioners.

STATEMENT

Following the enactment of the Natural Gas Act, approved June 21, 1938, and on July 5th of that year, the Federal Power Commission issued its Order No. 51 entitled "Instituting an Investigation of Natural Gas Companies and Directing the Filing of a Report." (R. p. 13) This Order included a questionnaire. The Order was shortly thereafter served upon Petitioners, and they made detailed and complete responses thereto, under oath, but under written reservation that such responses "should not be construed as a waiver by the Company of its rights to contest the jurisdiction of the Commission * * *."

As showing the purpose of said Order No. 51, we quote the following:

> "Now, Therefore, the Commission orders that:
>
> "(A) An investigation be and is hereby instituted to ascertain certain facts, conditions, practices or matters necessary and proper to aid the Commission in determining what persons are natural gas companies within the meaning of the Natural Gas Act, and in prescribing rules and regulations necessary and appropriate to carry out the provisions of said Act." (R. p. 14).

The only facts or "evidence" adduced in the course of said investigation and pursuant to said Order were the sworn responses of Petitioners which, as we contend, conclusively demonstrated that Petitioners were neither common carriers nor public utilities; that their properties had never been devoted to the public service; that their few contracts for the sale of gas were privately negotiated long before the enactment of the Act, and that they were therefore not natural gas companies within the meaning of the Act.

On the same day the Commission issued another Order, No. 53, entitled "Designating the Time for Filing of Schedules of Rates and Charges Under Section 4 (c) of the Natural Gas Act and Certain Reports in Connection Therewith." (R. p. 18) Although not having any "rates and charges" as contemplated by the Act, but only prices specified in the few privately negotiated contracts, Petitioners

nevertheless, with reservation of rights, filed, under oath, their said contracts in response to said Order. These contracts are described in the Order of March 14, 1939 (the Order sought to be reviewed), in paragraph (f) thereof (R. p. 21), and more particularly described as to dates of execution and dates of expiration at pages 31 and 32 of the Record.

Thereafter, on December 22, 1938, the City and County of Denver filed a complaint with the Commission against Petitioners and the Public Service Company of Colorado, alleging that the contract price for gas to the Public Service Company, a local distributing company, at the Denver Gate was unjust, unreasonable and discriminatory. To this complaint Petitioners filed a verified answer (R. p. 4) setting forth the facts as to the sale of gas under the contract with the Public Service Company, substantially as set forth in the responses to the prior Orders—Nos. 51 and 53—of the Commission above mentioned. They also set forth the facts and circumstances under which their contracts for the sale of gas were negotiated, and particularly the facts with reference to the contract with the Public Service Company for the supply of gas at the Denver Gate for the term beginning January 3, 1928, and ending February 8, 1947. In this verified answer it was alleged that the contract with the Public Service Company was not executed until a franchise ordinance was passed in Denver on February 8, 1927, requiring the Public Service Company to bring natural gas to Denver in case the City Council should determine that it was feasible. The City of Denver then employed an independent engineer, who reported to the Council that it was feasible, and that the Gate Rate subsequently provided for in said contract with the Public Service Company was reasonable. Thereupon Denver enacted an ordinance determining that the bringing of natural gas from the Amarillo Field to Denver was feasible, and ordered the Public Service Company to procure such gas. In this ordinance the rates to be charged by the Public Service Company to its local customers were fixed for a term ending February 8, 1947. Thereafter negotiations were completed by those interested in the organization of Petitioners and the representatives

of the Public Service Company, for a gas supply contract at such Gate Rate. It was further shown by said verified answer that the Colorado Interstate (the company so contracting with the Public Service Company) relied principally upon the contract for the sale of gas to the Public Service Company in making an investment of more than $20,000,000 to build the pipe line and make other necessary investments required to bring natural gas to Denver. Such line would not have been built, nor the capital ventured, but for said contract.

With all of this evidence before the Commission it proceeded to make its findings, and by its Order of March 14, 1939 (review of which is sought in this proceeding), it specifically refers to and implicates its Orders 51 and 53 and the responses thereto and the Denver Case.

Said Order of March 14, 1939, in paragraph (e) (R. p. 21) found that the Petitioners "are engaged in the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for re-sale for ultimate consumption for domestic, commercial, industrial, and other uses, *and are therefore natural gas companies within the meaning of the Natural Gas Act.*" (Emphasis ours.) Based upon such finding the Commission then initiated a proceeding for the purpose of determining whether the rates and contracts are unjust or unreasonable or discriminatory, and if so found, to determine and fix rates to be thereafter observed.

On April 12, 1939, Petitioners filed an Application for Rehearing in which they sought opportunity to present further evidence with respect to their status and contracts (R. p. 23) which on May 9, 1939, the Commission denied. (R. p. 37) In said Petition for Rehearing before the Commission it was shown that the articles of incorporation of the Petitioners contained this provision:

> "Provided that nothing herein shall be construed to authorize the corporation to transport natural gas for others as a common carrier for hire or to sell natural gas for others as a carrier for hire or to sell natural

gas except by special contracts, or to constitute the corporation a common purchaser of natural gas or a public utility corporation." (R. pp. 29 and 31.)

It was further shown that neither of the Petitioners ever exercised any rights or privileges of a public utility or held itself out as such; that neither of them ever claimed to possess or attempted to exercise the power of eminent domain (R. pp. 29 and 32); that neither of the companies ever held itself out to serve the public generally (R. p. 31), and that all of their contracts for the sale of gas were privately negotiated (R. p. 31). In denying the Application for Rehearing the Commission by reference made its opinion, No. 37, in *Re East Ohio Gas Company,* 28 P.U.R. (N.S.) 129, its opinion in our case. As appears from the opinion, the Commission had pursued the same method of investigation in the East Ohio Case. This opinion, we submit, makes it clear that the Commission had satisfied itself with respect to the status of these companies, and also that their contracts were subject to abrogation if found to be unreasonable or discriminatory. We have, then, an order in all respects meeting the test of reviewability laid down by this Court in *Rochester Tel. Corp. v. United States,* 307 U. S. 125, 83 L. Ed. 1147, namely, primary resort and administrative finality. The Commission proceeded with its investigation until it was through, so far as this question of status is concerned. The denial of the Petition for Rehearing, in which the various matters above referred to were brought to the attention of the Commission, shows conclusively that the Commission was through with its investigation, so far as status is concerned, and with respect to the legal questions raised, the Commission in the East Ohio Gas Case said:

"The circumstance that the company transports gas for 'its own account' which is 'owned by it and purchased by it from a single vendor under private contract,' does not exempt the company from the Natural Gas Act, as the Act is not restricted in its application to companies engaged in the transportation of natural gas in interstate commerce as 'common carriers', but

applies to all 'engaged in the transportation of natural gas in interstate commerce.' "

The Commission further said:

> "The company claims that it is not transporting natural gas in interstate commerce as a public utility, 'and cannot constitutionally be declared such by the legislative fiat of Section 1 (a) of the Natural Gas Act.' It is not within the Commission's province to pass upon the constitutionality of statutes enacted by Congress."

On July 7, 1939, Petitioners filed their Petition for Review in the Circuit Court of Appeals (R. p. 1 *et seq.*). Thereafter the Power Commission filed its Motion to Dismiss. The Commission never filed any Transcript with the Court. The Motion to Dismiss was sustained, and opinion rendered under date of March 4, 1940, (R. p. 39) and final Order entered on Petition for Rehearing and Opinion rendered under date of July 24, 1940, sustaining the Motion to Dismiss. (R. p. 60.)

STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

Section 19 (b) of the Natural Gas Act (52 Stat. 831, USCA Title 15, Section 717 (r)), after providing for review of orders of the Federal Power Commission by the United States Circuit Court of Appeals, provides:

> "The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (USC Title 28, Secs. 346 and 347.)"

QUESTIONS PRESENTED.

The questions involved in this case are the following:

1. Whether the Circuit Court of Appeals had jurisdiction to entertain the Motion to Dismiss filed by the Commission, in view of the failure of the Commission to file the Transcript of Record as required by Section 19 (b) of the Natural Gas Act.

2. Whether the Order of March 14, 1939, was a reviewable order.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals in this case has decided an important question of Federal law which, so far as the Natural Gas Act is concerned, has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals in this case has decided Federal question in a way probably in conflict with applicable decisions of this Court.

It is submitted that there is a grave question whether the lower court had jurisdiction to entertain the Motion to Dismiss in the absence of a Transcript of Record, in view of the decision of this Court in the *Matter of the Petition of the National Labor Relations Board for a Writ of Prohibition and for a Writ of Mandamus*, 304 U. S. 486. We submit also that there has been in this case the primary resort and administrative finality in a recent decision said by this Court to constitute the test of reviewability (*Rochester Tel. Corp. v. United States*, 307 U. S. 125), and that the lower court erroneously concluded that that decision was inapplicable.

For these reasons, which will more fully appear in the attached brief, it is respectfully submitted that the writ should be granted.

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